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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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11 SERGIO GARCIA-RIVAS,
12 Petitioner,
13 v.
14 UNITED STATES OF AMERICA,
15 Respondent.

Case No. 5:18-cv-02678-DOC-KES
ORDER TO SHOW CAUSE WHY
PETITION SHOULD NOT BE
DISMISSED

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18 Sergio Garcia-Rivas (“Petitioner”), a federal prisoner proceeding pro se, filed
19 a “motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2241[.]”
20 (Dkt. 1 [“Petition”] at 1.)¹ Petitioner admits that he has filed a prior motion
21 challenging his sentence under 28 U.S.C. § 2255. As discussed further below, the
22 Court directs Petitioner to explain why the Petition should not be dismissed as an
23 unauthorized second-or-successive motion under § 2255.

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¹ All page citations to district court filings refer to the pagination imposed by
27 the federal courts’ electronic filing system, CM/ECF. When quoting directly from
28 Petitioner’s pro se filings, the Court has amended spelling errors where Petitioner’s
meaning is clear.

I.

BACKGROUND

Petitioner was indicted in the U.S. District Court for the Western District of Oklahoma (“the Sentencing Court”) on 11 counts related to his alleged participation in a drug-trafficking conspiracy. United States v. Garcia-Rivas, No. 5:12-cr-00247-R-1 (W. D. Okla. Oct. 17, 2012), Dkt. 122 (indictment). Petitioner pled guilty, pursuant to a plea agreement, to one count of distribution of methamphetamine and was sentenced to 180 months; judgment was entered on May 8, 2014. Id., Dkt. 273 (judgment). Petitioner did not file a direct appeal.

Petitioner admits that he has filed a prior motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Pet. at 1 [“Petitioner … filed his primary 28 U.S.C. § 2255 alleging that the district court committed error when determining that the offense level of the case, i.e., drug quantity was overrepresented.”]). The Sentencing Court denied that motion in March 2016. Garcia-Rivas, No. 5:12-cr-00247-R-1, Dkt. 309. Petitioner challenged this denial in the U.S. Court of Appeal for the Tenth Circuit, and on November 1, 2016, the Tenth Circuit denied him a certificate of appealability (“COA”). United States v. Garcia-Rivas, 669 F. App’x 960, 961-62 (10th Cir. 2016).²

II.

CLAIMS RAISED IN CURRENT PETITION

Petitioner is currently housed at the Federal Correctional Institution (“FCI”) in Victorville, California, which is in the Central District of California. (Pet. at 1.) See also Federal Bureau of Prisons Inmate Locator, https://www.bop.gov/inmate_loc/. His current Petition argues that the Sentencing Court “committed error when

² Petitioner also filed several other unsuccessful post-conviction motions in the Sentencing Court. Garcia-Rivas, No. 5:12-cr-00247-R-1, Dkt. 284, 334, 337, 338, 346.

1 determining that the offense level of the case, i.e., drug quantity was
2 overrepresented.” (Pet. at 2.) Petitioner argues that the Sentencing Court “erred
3 when determining that he is to be held accountable [for] 900 grams [i.e., about 2
4 pounds] of methamphetamine.” (Pet. at 5.) Petitioner explains:

5 The [Sentencing Court] overruled the probation officer’s PSI
6 recommendation ... [B]ased on the stipulation of the plea agreement
7 the [Sentencing Court] adopted that [Petitioner] pled guilty to the drug
8 quantity of two pounds. ... [A]t sentencing [Petitioner] objected to the
9 two pounds and advised the [Sentencing Court] that counsel of record
10 stated he “was” ... pleading to 246.3 grams [i.e., about 0.5 pounds] of
11 methamphetamine (actual). ... [T]he [Sentencing Court] took into
12 consideration such and accepted a downward departure because the
13 drug quantity which is incorporated in the “Plea Agreement v. Plea
14 Stipulation” diminishes substantively. ...

15 At face value the “Plea Agreement” states that [Petitioner] pled
16 guilty to Count 12, which incorporates “only” 246.3 grams of
17 methamphetamine and no more. ...

18 ... The [Sentencing Court] should [have] sentenced [Petitioner] to
19 offense level 32 instead of departing downward and sentencing him to
20 offense level 34 minus 3 levels for accepting responsibility.

21 Considering such, [Petitioner’s] sentencing range would
22 thus be 121 months to 151 months.

23 (Pet. at 2-3.)

24 Petitioner argues that the Tenth Circuit should have granted him a COA.
25 (Pet. at 4 [citing 28 U.S.C. § 2253 and Miller-El v. Cockrell, 537 U.S. 322, 327
26 (2003) and arguing he has made “a substantial showing of the denial of a
27 constitutional right”].) He asks that this Court “issue an order granting that this
28 case be subject to remand to the District Court,” i.e., the Sentencing Court. (Id. at

1 8.)

2 **III.**

3 **LEGAL STANDARD**

4 A habeas petition “must” be summarily dismissed “[i]f it plainly appears
5 from the petition and any attached exhibits that the petitioner is not entitled to relief
6 in the district court.” Habeas Rule 4.³ These rules may be applied to petitions filed
7 under § 2241. Habeas Rule 1(b).

8 28 U.S.C. § 2255 provides that a federal prisoner “may move the court which
9 imposed [his] sentence to vacate, set aside or correct the sentence” on the ground
10 that the sentence “was imposed in violation of the Constitution or laws of the
11 United States, or that the court was without jurisdiction to impose such sentence, or
12 that the sentence was in excess of the maximum authorized by law, or is otherwise
13 subject to collateral attack....” 28 U.S.C. § 2255(a). Generally, § 2255 provides
14 the exclusive procedural mechanism by which a federal prisoner may test the
15 legality of his detention. Alaimalo v. United States, 645 F.3d 1042, 1046 (9th Cir.
16 2011).

17 Federal prisoners are generally limited to one petition under § 2255. In order
18 to file a second or successive § 2255 motion, the petitioner must obtain a certificate
19 from a U.S. Circuit Court of Appeal finding that the new motion contains:

- 20 (1) newly discovered evidence that, if proven and viewed in light of
21 the evidence as a whole, would be sufficient to establish by clear and
22 convincing evidence that no reasonable factfinder would have found
23 the movant guilty of the offense; or
24 (2) a new rule of constitutional law, made retroactive to cases on

25 ³ Citations to the “Habeas Rules” refer to the Rules Governing §§ 2254 and
26 2255 Cases in the United States District Courts. These rules are available online at:
27 [https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-](https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf)
28 [section-2255-proceedings.pdf](https://www.uscourts.gov/sites/default/files/rules-governing-section-2254-and-section-2255-proceedings.pdf).

1 collateral review by the Supreme Court, that was previously
2 unavailable.

3 28 U.S.C. § 2255(h); see also United States v. Buenrostro, 638 F.3d 720, 726 (9th
4 Cir. 2011) (prisoner who did not offer newly discovered evidence proving his
5 innocence or rely on a new rule of constitutional law could not bring a successive
6 motion under § 2255).

7 Under § 2255(e), however, a federal prisoner may file a habeas petition under
8 § 2241 if the remedy provided by § 2255 is ‘inadequate or ineffective to test the
9 legality of his detention.’’ Alaimalo, 645 F.3d at 1046. “This is called the ‘savings
10 clause’ or ‘escape hatch’ of § 2255.” Id. at 1047. “A [§ 2241] petition meets the
11 escape hatch criteria where a petitioner (1) makes a claim of actual innocence, and
12 (2) has not had an unobstructed procedural shot at presenting that claim.” Id.
13 (citation omitted).

14 “To establish actual innocence for purposes of habeas relief, a petitioner
15 ‘must demonstrate that, in light of all the evidence, it is more likely than not that no
16 reasonable juror would have convicted him.’’ Id. (quoting Stephens, 464 F.3d at
17 898). “A petitioner is actually innocent where he was convicted for conduct not
18 prohibited by law.” Id. In considering whether the petitioner had an unobstructed
19 procedural shot at presenting his claim, courts consider: “(1) whether the legal basis
20 for petitioner’s claim did not arise until after he had exhausted his direct appeal and
21 first § 2255 motion; and (2) whether the law changed in any way relevant to
22 petitioner’s claim after that first § 2255 motion.” Id. at 1047.

23 A habeas petitioner “may not avoid the limitations imposed on successive
24 petitions by styling his petition as one pursuant to 28 U.S.C. § 2241....” Moore v.
25 Reno, 185 F.3d 1054, 1005 (9th Cir. 1999). “Petitioner’s remedy under § 2255 is
26 not rendered inadequate or ineffective [for purposes of the “escape hatch” in
27 § 2255(e)] because his previous collateral attacks have been unsuccessful or
28 because he cannot meet the strict procedural requirements for filing a successive

1 § 2255 petition.” Fisher v. Schultz, No. 15-00388, 2005 U.S. Dist. LEXIS 49028 at
2 *7, 2005 WL 1554639 at *3 (E.D. Cal. June 27, 2005). “Similarly, § 2255 is not
3 inadequate or ineffective merely because a particular petitioner’s § 2255 motion is
4 procedurally barred” or “because a petitioner misses the statute of limitations.” Id.

5 **IV.**

6 **DISCUSSION**

7 As described above in the Background section, Petitioner has previously filed
8 at least one motion under § 2255 in the Sentencing Court that challenged the same
9 sentence challenged in his present Petition. (See also Pet. at 2, admitting that
10 Petitioner filed “his primary 28 U.S.C. § 2255 [motion] alleging that the district
11 court committed error when determining that the offense level of the case, i.e., drug
12 quantity was overrepresented”). He does not allege that he has obtained the
13 necessary permission to file a second-or-successive § 2255 motion from the Tenth
14 Circuit, however, and a second § 2255 motion, even if authorized, would need to be
15 filed in the Sentencing Court. See 28 U.S.C. § 2255(a) (providing that a prisoner
16 may move “the court which imposed [his] sentence”).

17 Petitioner is attempting to proceed under § 2241. (Pet. at 2.) If he can
18 properly do so, venue is proper in this Court (the custodial court) rather than in the
19 Sentencing Court. See Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000)
20 (“[T]he proper district for filing a habeas petition depends upon whether the
21 petition is filed pursuant to § 2241 or § 2255. In particular, a habeas petition filed
22 pursuant to § 2241 must be heard in the custodial court ... even if the § 2241
23 petition contests the legality of a sentence by falling under the savings clause.”);
24 (Pet. at 1, stating Petitioner is confined at FCI Victorville); 28 U.S.C. § 84(c) (San
25 Bernardino County is in the Central District); https://www.bop.gov/locations/
26 institutions/vim/ (FCI Victorville is in San Bernardino County).⁴

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⁴ The Court takes judicial notice of the fact that FCI Victorville is in the

1 In order to proceed under § 2241, however, Petitioner must (1) make a claim
2 of actual innocence, and (2) show that he has not had an unobstructed procedural
3 shot at presenting that claim. See 28 U.S.C. § 2255(e); Alaimalo, 645 F.3d at 1046-
4 47. His current allegations do not meet this test. First, the Petition does contend
5 that he is actually innocent of the underlying charge, to which he states he pled
6 guilty. The Petition merely argues that he is entitled to a shorter sentence. Second,
7 it appears that his prior § 2255 motion raised similar (if not identical) arguments to
8 his current § 2241 motion. See Garcia-Rivas, 669 F. App’x at 961-62 (Tenth
9 Circuit order denying Petitioner a COA, rejecting Petitioner’s argument that “the
10 district court erred in determining his guidelines offense level by attributing to him
11 two pounds of methamphetamine rather than only the 246.3 grams to which he
12 pleaded guilty”). Thus, it appears that he had an unobstructed procedural shot at
13 presenting his claim.

14 Because Petitioner currently makes no attempt to explain how or why he
15 meets the “escape hatch” criteria, however, the Court will give Petitioner an
16 opportunity to address this issue.

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28 Central District of California. See Fed. R. Evid. 201.

V.

CONCLUSION

IT IS HEREBY ORDERED that, within thirty (30) days of the date of this Order, Petitioner shall file a written response to this Order to Show Cause that explains why Petitioner believes this Court should not dismiss his Petition as an unauthorized second-or-successive § 2255 motion.

7 Alternatively, Petitioner may voluntarily dismiss the Petition. The Clerk is
8 directed to provide Petitioner with the voluntary dismissal form.

10 | DATED: February 07, 2019

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge